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In The

Supreme Court of the United States

OCTOBER TERM, 1970

No._____

JOHN KERR,
Petitioner,

v.

STATE PUBLIC WELFARE COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OREGON

The petitioner, John Kerr, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of the State of Oregon entered in this proceeding on June 4, 1970.

OPINION BELOW

The opinion of the Court of Appeals of the State of Oregon is reported at Or. App. 90 Adv. Sh. 1441, 470 P2d 167 (1970) (App. p. 6). The opinion of the Circuit Court of the State of Oregon which was the trial court, is unreported (App. p. 14). No opinion was made by the Supreme Court of the State of Oregon in denying discretionary review.

JURISDICTION

The judgment of the Court of Appeals of the State of Oregon was entered on June 4, 1970. A timely petition for rehearing was denied July 7, 1970. A timely petition for review by the Supreme Court of Oregon was denied on September 29, 1970. This petition for certiorari will be filed within 90 days of that date. This Court's jurisdiction is invoked under *28 USC § 1257 (3)*.

QUESTION PRESENTED

Whether Oregon appropriations for support of the poor may be taxed against petitioner on the basis of his accidental family relationship to a recipient of this support even though others with similar relationships are excluded from such tax without violation of the due process and equal protection clauses of *section 1, Fourteenth Amendment, United States Constitution?*

UNITED STATES CONSTITUTIONAL PROVISION INVOLVED

AMENDMENT XIV

Section 1. * * * nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
* * *

OREGON STATUTES INVOLVED

ORS 416.060 (1). The living relatives of any needy person are hereby made jointly and severally liable to such person for monthly contributions of money not to exceed total cost, in accordance with the following relatives' contribution scale:
* * *

(2) When any living relative is required to contribute according to the scale in subsection (1) of

this section, he may compel contribution from any other living relative or relatives liable under ORS 416.010 to 416.260.
* * *

STATEMENT OF THE CASE

Facts

Petitioner is one child of an Oregon welfare recipient and is required by this proceeding to reimburse the Oregon State Public Welfare Commission for welfare furnished to his father (Record).

Manner of Raising Federal Question

The unconstitutionality of the statute under the equal protection clause was raised in the court of the first instance, the Circuit Court for Multnomah County, at the earliest stage possible, by paragraph IV of the petition for review of the administrative agency (App. p. 25), and directly passed upon (App. p. 14).

This was also raised on appeal (App. p. 28) to the Oregon Court of Appeals, and directly passed upon (App. p. 6). It was raised again in petition for rehearing Error II (App. p. 29), and to the Supreme Court of Oregon by petition for review, Point 2 (App. p. 30), which review was not granted (App. p. 31).

REASONS FOR GRANTING THE WRIT

The reason for granting the writ is that the highest State Courts differ in their determination of the Federal Constitutional question involved, on a matter of importance which is reoccurring.

The prior grant of certiorari in *Mental Hygiene Dept. v. Kirchner*, 380 US 194 (1965) was undoubtedly

based upon this, but was dismissed since that decision was based also on an adequate State substantive ground which is not the case here.

ARGUMENT

Support of the poor has been a public duty for centuries. The issue is whether the State in discharging this duty by appropriating money for support of the poor can impose the cost thereof—taxes, *United States v. Butler*, 297 US 1 (1936)—upon some people in a classification based wholly on accidental family relationship (not parent for child, nor one spouse for the other, which do have another basis), and not even equal within such class? It is submitted that the Supreme Court of California is right, *Dept. of Mental Hygiene v. Kirchner*, 60 C2d 716; 388 P2d 720; 36 Cal. Rptr. 488 (1964), and the Supreme Court of Oregon is wrong. *Mallatt v. Luihn*, 206 Or. 678; 294 P2d 871 (1956).

Family relationship is not an adequate basis for a tax. *Hoeper v. Tax Commission*, 284 US 206 (1931); *Oyama v. California*, 332 US 633 (1948).

The further discrimination between those equally within this limited class, here other children of the welfare recipient but not so taxed, is additionally discriminatory and arbitrary. The reasoning of *Mallatt v. Luihn* that the ones not taxed are given a right to sue for contribution is inadequate. It is like imposing all income taxes on those whose names begin with the letter "S" and allowing action for contribution against names beginning with the other twenty-five letters of the alphabet.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals of Oregon.

Respectfully submitted,

HOWARD R. LONERGAN,
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Counsel for Petitioner

APPENDIX

OPINION OF OREGON COURT OF APPEALS

IN THE COURT OF APPEALS OF THE STATE OF OREGON

Department 2

John Kerr,

Appellant,

v.

State Public Welfare Commission,

Respondent.

Appeal from Circuit Court, Multnomah County.

James M. Burns, Judge.

FORT, J.

The plaintiff-appellant challenges an order declaring him liable for contribution to the defendant in the total sum of $420 for welfare aid given by it over an 18-month period to James D. Kerr, the plaintiff's father. The order was entered by the defendant pursuant to procedures authorized by law under the Oregon Relatives' Responsibility Law, ORS ch 416. Pursuant to plaintiff's petition, this order was duly reviewed by the circuit court, and by its decree, "the findings of fact, conclusions of law and final decision of the defendant" were adopted and affirmed by the court and judgment of $420 accordingly entered against the plaintiff. He appeals, assigning as error, first, the failure to grant him exemption from liability as an exempt relative under ORS 416.030(2)(b), and, second, that the Relatives'

Responsibility Law is an unconstitutional Act in that it denies the equal protection of the laws to members of plaintiff's class, namely, children of a person receiving welfare aid.

ORS 416.030 provides:

"* * *

"(2) No liability for the support of a needy person shall be imposed under the provisions of ORS 416.010 to 416.260 upon:

"* * *

"(b) The child of a needy person if, during the minority of the child, such person wilfully deserted or abandoned the child, or, by expulsion or cruelty, drove the child from the parental home, or, without good cause, was responsible for the child's being 'dependent' as defined by subsection (2) of ORS 418.205."

ORS 418.205 defines a dependent child as one "whose * * * condition is such as to fall within the provisions of paragraphs (a) to (e) of subsection (1) of ORS 419.476."

The plaintiff contends that he was a dependent child under ORS 419.476(1)(e) which provides that a child is within the jurisdiction of the juvenile court if

"Either his parents or any other person having his custody have abandoned him, failed to provide him with the support or education required by law, subjected him to cruelty or depravity or failed to provide him with the care, guidance and protection necessary for his physical, mental or emotional well-being * * *."

In his brief, plaintiff contends that his father, with respect to him, violated the compulsory school attend-

ance laws and the child labor laws, and failed to furnish him with reasonable medical and dental care.

During the appellant's first 18 years, Mr. James Kerr, plaintiff's father, was a gypo logger who migrated from one forest area to another in Oregon, depending upon the availability of timber, and, during the war years, of manpower. Generally the family lived as a unit in remote areas of the state. The life was not an easy one for any of the family. Schooling was upon occasion interrupted both by movement from one location to another and by distances in excess of those described in ORS 339.030. For example, plaintiff, when about eight years of age, missed a year of school. During that time the family home was well in excess of one and one-half miles from a public school, and pupil transportation was not furnished by school bus. Under the foregoing statute, then, the law did not require his attendance. Ultimately, he completed the tenth grade. We find no willful violation by the father of the school attendance laws.

Petitioner does not contend he was deserted or abandoned, that he was not well fed, or that he was unfairly discriminated against in comparison with his siblings, considering the normal differences arising from age and sex. During his boyhood, until he was 18, he generally worked long and hard after school and during vacations, without compensation, for and under the direction of his father, doing a man's work in the woods, often together with his brother. He sustained some injuries while he was under 18, including damage to one

hand and eye from the explosion of dynamite caps which he was holding. He makes no claim of intoxication, wanton negligence or intentional injury, however, on the part of his father in connection with any injury he sustained. Chaffin v. Chaffin, 239 Or 374, 397 P2d 771 (1964); Falls v. Mortensen, 207 Or 130, 295 P2d 182 (1956) (wanton negligence); Cowgill v. Boock, 189 Or 282, 218 P2d 445, 19 ALR2d 405 (1950) (intoxication).

He contends that the father's conduct alleged was cruelty within the meaning of ORS 416.030(2)(b). In Chaffin v. Chaffin, supra, the Supreme Court said:

> "* * * [W]e conclude that an act by a parent, whether described as willful or malicious or wanton, which will pierce the veil of parental immunity, is an act which is done with an intention to injure the child or is of such a cruel nature in and of itself as to evidence not a reasonably normal parental mind, but an evil mind, *malo animo*. * * *" 239 Or at 387.

While that case dealt with the type of conduct by a father toward his child necessary to give rise to a right of action on behalf of that child against the father, we think it aptly describes the type of conduct necessary to constitute "cruelty" within ORS 416.030(2)(b), thereby insulating a child from liability for contribution for the support of a parent under the Act.

Thus even though a parent operating a small logging operation employed his own child without compensation therein at an age below that permitted for the particular work under the child labor law then governed by § 49-402, O C 1930, and thus in violation of the Act, it would not, in the absence of *malo animo* on the part of the father, constitute an exemption under ORS 416.030

(2) (b). There is neither any contention nor evidence here which would support such a finding of *malo animo* on the part of the father.

We think, therefore, that the trial court correctly concluded that the appellant is not exempt from liability for support under the Relatives' Responsibility Law, and that its determination in upholding, and that of the defendant in imposing, a liability of $420, is suported by the evidence.

The second contention concerns the claimed unconstitutionality of the Act because it denies the equal protection of the laws to members of the appellant's class—that is, children of a person receiving welfare aid.

Appellant relies heavily on Dept. of Mental Hygiene *v. Kirchner, 60 Cal2d 716, 36 Cal Rptr 488,* 388 P2d 720, 20ALR3d 353 (1964). There the California Supreme Court held under the California Constitution and statute that since the purpose of a commitment to a mental institution is to "encompass the protection of society from the confined person, and his own protection and possible reclamation as a productive member of the body politic," (60 Cal2d at 720) its statute which imposed liability for the support of the confined person upon his child was unconstitutional because it arbitrarily charged one class—the children—in society for the care of the person committed.

Our Supreme Court, however, has had occasion to consider the application of the equal protection clause, both of the Fourteenth Amendment to the Federal Constitution and Art I, § 20 of the Oregon Constitution, to

the Oregon Relatives Responsibility Act. In Mallatt v. Luihn, 206 Or 678, 701, 294 P2d 871 (1956), the court said:

> "The plaintiff contends on two grounds that the 1953 Act violates the equal protection clause of the Fourteenth Amendment to the Federal Constitution and Art I, § 20, of the Constitution of Oregon. It is asserted first that the statute arbitrarily fixes liability with reference to gross income as shown by the relatives' state income tax return, and could result in exempting some relatives of wealth but no income, thereby discriminating against those who file income tax returns. This same contention was urged in *Los Angeles County v. Hurlbut*, 44 Cal App2d 88, 111 P2d 963, and rejected upon the familiar ground that if there is a reasonable basis for classification, and all persons within the class are treated equally, there is no constitutional infirmity in the legislation. The court there held that the 'purpose behind the scheme of proceeding against those filing income tax returns was to abbreviate the labors of those investigating the pecuniary ability of the kindred of a recipient' and that on the assumption 'that the legislative intent was to proceed only against those filing income tax returns, in view of its obvious purpose, this is a natural classification which the legislature, in the exercise of its discretion had the right to designate as the first element in the proof of financial ability.'
>
> "The Hurlbut case was approved and followed in *Kelley v. State Board of Social Welfare*, 86 Cal App2d 627, 186 P2d 429.
>
> "We agree with the reasoning of the California decisions."

The court further held that the legislative classification imposing liability on the children was a reasonable one.

We think that the *Kirchner* case can be clearly distinguished from the case at bar. Here there was no confinement of the father. He simply was receiving welfare aid. The statute involved in *Kirchner*,[1]

> "* * * by its terms imposes absolute liability upon, and does not even purport to vest in, the servient relatives any right of control over, or to recoup from, the assets of the patient. * * *" 60 Cal2d at 722.

The Oregon statute here involved imposes no such liability on the child of a welfare recipient. Here ORS 416.010(3) defines a person eligible for assistance under ORS ch 416 as a "needy person." It further provides that a grant of assistance under the Act

> "* * * shall be prima facie evidence that such person does not have income or resources sufficient to provide himself with food, clothing, shelter and such other essentials as are necessary to sustain life and as are compatible with decency and good health." ORS 416.070(1).

ORS 416.060(2) allows any child found liable to obtain contribution from any of his siblings, and ORS 416.310 makes the estate of a deceased recipient liable therefor.

For cases holding contrary to the *Kirchner* case under statutes generally similar to California, see Annotation, 20 ALR3d 363. The Oregon Supreme Court in In Re Idleman's Commitment, 146 Or 13, 27 P2d 305 (1933), under a former statute, ORS 428.010 to 428.150, now repealed, requiring named relatives to contribute to the support of the mentally committed, said:

---

[1]Welfare and Institutions Code, § 6650.

> "* * * The appellant seems to believe that, since the state institutions mentioned in this act have been supported in the past by taxation, the state cannot exact a charge from the inmates or their relatives to defray the cost of the inmates' maintenance. He seems to believe that the state has somehow imposed upon itself a contractual duty to maintain these institutions solely at the expense of the taxpayer. It is evident that both the incompetent and his immediate relatives receive a very valuable service from the state when he is placed under the care of the state's trained psychiatrists in an institution where his prospects for recovery, when present, are facilitated and where he is guarded from the dangers attendant upon his helpless condition. Under such circumstances the contributions made by the taxpayers are for the benefit of the public, while the sum paid in support of any particular inmate by himself or his relatives is for his personal benefit * * *. The sum exacted by this statute is not a tax but is mere payment for a service rendered by the state institutions * * *." 146 Or at 26-27.

We agree with respondent that the reasoning there employed is persuasive here, and that the rule of the *Kirchner* case has no application here.

We conclude, therefore, the claim that the statute imposing liability on appellant is in violation of the equal protection provisions found in Art I, § 20 of the Oregon Constitution and the Fourteenth Amendment to the Federal Constitution is without merit.

The judgment is affirmed.

OPINION CIRCUIT COURT FOR MULTNOMAH COUNTY

John Kerr vs.
State Public Welfare

No. 342-744

Gentlemen:

This is a review under Chapter 416 of an order by the defendant requiring the plaintiff to respond under the Relative Responsibility law. The scope of review is described in ORS 416.070; also see ORS 183.480. I am governed by the "substantial evidence" rule which has been described a number of times and recently in *Bay v. State Board of Education*, 233 Or 601. The review that I conduct is not *de novo*, as is true in certain statutes such as ORS 656.298.

Plaintiff contends that he is not liable to the Commission in the amount of $420.00 as decided by the Commission and the Referee because he says he was driven from the parental home under circumstances which would exempt him from liability under ORS 416.030(2)(b). I see no need whatsoever to set forth here a review of the testimony relating to defendant's melancholy childhood and youthhood. There is substantial evidence in the record which would authorize the Commission and the Referee to find that the dependent parent did not act so as to trigger the exemption statute. In short, the agency did not arrive at a conclusion which was clearly wrong. Consequently, despite whatever distaste I might have for the statute, I have no power to substitute my independent judgment of the facts for that of the agency.

Plaintiff also has a constitutional objection. As has already been held by Judge Jones of this court (No. 316-414), this objection is meritless. Accordingly, I deny the plaintiff's petition for review and affirm the agency's decision. Mr. Hoyez should submit an appropriate form of order.

Very truly yours,

James M. Burns

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH

HAROLD L. CHASE, Plaintiff, vs. STATE PUBLIC WELFARE COMMISSION, ALVIS O. CHASE, RICHARD L. CHASE, FLORENCE C. VERLEY, MARIS WOLFER, CLIFFORD CHASE and JESSE EDITH CHASE, Defendants.	)))))))))	NO. 316 414 OPINION

Tht substantial issue in this case is whether the effect of the proceedings before the State Public Welfare Commission and its decision therein was a violation of the plaintiff's rights under the due process and equal protection provisions of *Section 1, 14th Amendment, U.S. Constitution*, and under *Article I, Section 20, Oregon Constitution*. These sections provide as follows:

> *Section 1, 14th Amendment, U.S. Constitution*
> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
>
> *Article I, Section 20, Oregon Constitution.*
> "EQUALITY OF PRIVILEGES AND IMMUNITIES OF CITIZENS. No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens.—"

The proceedings before the State Public Welfare Commission were held under authority of *Chapter 416*

of the Oregon Revised Statutes, and in particular *ORS 416.010 to 416.270*. As a result of these proceedings, plaintiff was found liable for the support of Jesse Edith Chase, his natural mother, to the extent of $600.00. Plaintiff complains that this assessment is a tax, and that the tax is imposed without adequate basis and is unequally applied, thus depriving him of his constitutional rights. Plaintiff's position is ably stated in Mr. Lonergan's *Letter Brief for Plaintiff of November 18, 1967*:

> "The issue on such attack is whether the State in discharging a public burden, i.e., support of the poor, imposes the expense thereof, i.e., a tax, *U.S. v. Butler*, 297 US 1, upon some of the people in a classification based wholly on accidental family relationship (not parent for child, or one spouse for the other, which has a basis), and not even equal within such class? It is submitted the decision in *Dept. of Mental Health v. Kirchner*, supra, [60 C2d 716, 388 P2d 720] which says "No" is correct.
>
> Family relationship is an inadequate basis for a tax. *Hoeper v. Tax Commission*, 284 US 206, *Oyama v. California*, 332 US 633. The discrimination between those equally within the class, i.e., the plaintiff here, who is only one of the children, is discriminatory and unjustifiable. *Penn. v. State Tax Commission*, 84 Or. Adv. Sh. 1063, 1067-1068."

Plaintiff also relies on *Article I, Section 10, Oregon Constitution*. This was mistyped in the petition as Section *9*.

The defendant State Public Welfare Commission, in its *Memorandum Brief*, relies heavily on *Mallatt v. Luihn*, 206 Or 678, and certain California cases subsequent to *Kirchner*.

Plaintiff's *Letter Brief of January 22, 1968* attempts to distinguish the later California cases, and contends that "*Mallatt v. Luihn* is based on the California Court of Appeals' decisions overruled by *Kirschner*". (The *Brief* also made other contentions.)

Although *Mallatt v. Luihn*, supra, does appear to be controlling on many facets of this case, the *Relative's Responsibility Law, ORS 416.010-416.270* has been substantially amended since the decision in this case. The amendments appear, in fact, to have corrected many of the aspects of the law complained of by the respondent in the *Mallatt case* which were, nevertheless, held to be constitutional. These changes in the law over the years are helpful in interpreting legislative intent. Because of the changes made, the present law will have to be re-examined.

The first question that must be answered in evaluating plaintiff's constitutional claims is whether the liability of "relatives" for the support of a "needy person" under *ORS 416.010 to 416.260* is a "tax". This Court answers this question "No".

> "The distinction between a demand of money under the police power and one made under the power to tax is not so much one of form as of substance. * * * If the purpose is regulation, the imposition ordinarily is an exercise of the police power, while if the purpose is revenue the imposition is an exercise of the taxing power and is a tax. If, therefore, the purpose is evident in any particular instance, there can be no difficulty in classifying the case and referring it to the proper power. * * *"

A portion of *Cooley, Taxation, 4th ed, §1784*, which is quoted with approval in *Haugen v. Glea-*

> *son,* (1961), 226 Or 99, 359 P2d 108; *Terry v. City of Portland,* (1955), 204 Or 478, 269 P2d 544; and *Starker v. Scott,* (1948), 183 Or 10, 190 P2d 532.

The evident purpose of the *Relative's Responsibility Law* is to regulate family status by attaching certain obligations for the support of close relatives to such status in order that the relatives will not become public charges.

ORS 416.060 provides that "the living relatives of any needy person are . . . jointly and severally liable to such persons for monthly contributions of money . . ." and *ORS 416.090* that "each needy person in Oregon has a cause of action at law against any living relative or relatives . . . for the monthly contribution to his support . . ." If a needy person is a recipient of public assistance, the state commission is subrogated to the right to prosecute the cause of action at law by *ORS 416.100.*

"For purposes of ORS 416.010 to 416.260: * * * (4) 'Relative' or 'relatives' means the living husband, wife, father, mother, son or daughter 21 years of age or over of an applicant for or a recipient of public assistance" (*ORS 416.010 (4)*).

> "It is well established that the courts will not undertake to disturb a legislative classification unless the legislature could not have had any reasonable grounds for believing that there were valid public considerations for the distinction made." [citing cases] *Mallatt v. Luihn, supra, at page 702.*

It is apparent that reasonable grounds for this classification exist. There is a reasonable basis (close family relationship) for the imposition of the legal obligation

(support) and a reasonable standard qualifying the obligation (need, as defined by *ORS 416.010 (3)*; and amount and ability of the relative to pay, as defined by the *Relatives' Contribution Scale of ORS 416.060)*. Keeping needy persons from becoming public charges and the reduction of the amount of the charge on the public are valid public considerations.

The fact that the legislature has endeavored to apply an objective, yet flexible, standard in determining the need which will give rise to an obligation of support does not make the regulation unconstitutional or otherwise invalid. By making the standard of need that which would qualify one for public assistance, rather than using a standard based upon family "style of life" or a similar, more subjective standard, the legislature has merely demonstrated its intention to accomplish its purpose without placing an undue and potentially unlimited burden on family members, and of protecting them from unconscionable claims. At the same time the standard is one which will presumably take into account changing social and economic conditions. Further protection is afforded family members by limiting the amount of the obligation of a family member to that set forth in the statutory schedule, which takes family member's income and dependents into account, and setting the maximum required contribution at the amount for which the needy person would be eligible under public assistance, which would be "minimum standard support".

The administration and enforcement of the laws requiring family members to support the needy members

of their family is planned for efficiency and economy. Having set a standard of need for the purposes of family support on the basis of public assistance eligibility, the legislature provided that the governmental bodies which apply the standards for the purposes of public assistance also determine whether eligibility exists for the purposes of support liability. Not only does this effect economies, avoid duplication of effort, and utilize existing expertise, but it facilitates the legislative policy that needy persons should not suffer the possibility of starvation and deprivation even temporarily. By applying the same standard of need in the same way, the legislature has provided that persons who have a right to support by a relative will not be without necessities while waiting to have these rights enforced. To the extent that the State is discharging the obligations that ought to be discharged by others, it is equitable that the State be subrogated, as it is under *ORS 416.100*, to the claim of the needy person. (See also *ORS 416.080)*.

Applying the test provided by *Cooley, Taxation*, supra, the court concludes that the *Relative's Responsibility Law* does not impose a tax. It is a regulation of family status of the same type as is found in *Chapter 108 of the Oregon Revised Statutes*, which regulates the liability for the expenses of family or education *(ORS 108.040)* and the petitioning for the support of wife and children *(ORS 108.110)*. The obligations imposed by the *Relative's Responsibility Law* are therefore within the constitutional power of the State to regulate such relationships.

The case of *Department of Mental Hygiene v. Evelyn Kirchner, as Administratrix,* (1964), 36 Cal Reptr 488, 388 P2d 720, is distinguishable on its facts because the liability sought to be imposed in this case was for care in a public institution and the liability was independent of the means of the recipient of such care. The decision in *Kirchner* is not relevant to the facts in this case.

Defendant's claim that he was deprived of his rights under *Article I, Section 10, Oregon Constitution* because full information on the financial condition of the other "relatives" of Mrs. Chase was not produced is without merit in light the court's conclusion that the obligation imposed is one of regulation and not a tax. Plaintiff's liability is a joint and several liability. *ORS 416.060(1).* "When any living relative is required to contribute according to the scale in subsection (1) of this section, he may compel contribution from any other living relative or relatives under ORS 416.010 to 416.260". *ORS 416.060(2).* The proceeding before the State Public Welfare Commission was to determine the plaintiff's personal liability. The financial condition of any other living relative does not affect this liability, and information with respect their financial condition is therefore irrelevant to the proceedings. Therefore the non-production of such information is not violative of the plaintiff's constitutional right to the open administration of justice. *Article I, Section 10, Oregon Constitution.* Plaintiff's just claims for contribution from other relatives of sufficient means is fully recognized, and an adequate remedy given, under *ORS 416.060(2).*

THEREFORE the court finds in favor of the defendant State Public Welfare Commission in this case and against the plaintiff Harold L. Chase.

Dated this 31st day of Jan. 1968, at Portland, Oregon.

s/Robert E. Jones

Circuit Court Judge

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH

JOHN KERR, Plaintiff,	)	No. 342744
vs.	)	PETITION
STATE PUBLIC WELFARE COMMISSION, Defendant.	)	FOR REVIEW

John Kerr, for his petition for review, alleges:

I.

At all times herein mentioned, John Kerr, Joy Knoll, Daniel Kerr, James Kerr, Dorothy Killum, Susan Bridges and Luella Wakehouse were and still are the children of James D. Kerr, and all are of full legal age and competency.

II.

On or about June 3, 1968, the State Public Welfare Commission made a decision finding plaintiff liable for the support of James D. Kerr in the sum of $420 and making no finding with regard to the other children.

III.

That plaintiff is not liable for the support of said James D. Kerr, because said James D. Kerr by cruelty drove said plaintiff from the parental home and without good cause was responsible for plaintiff's being dependent, in that the conditions and circumstances under which plaintiff lived were such as to endanger plaintiff's welfare, and said James D. Kerr failed to provide him the support or education required by law, subjected him

to cruelty and failed to provide him with the care, guidance and protection necessary for his physical, mental and emotional wellbeing.

IV.

That this decision and the Relative Responsibility Law, *ORS Chapter 416*, placing liability for an indigent father solely upon plaintiff because of plaintiff's being one son of said indigent is without a rational basis and violates the due process and equal protection clauses of *section 1, Fourteenth Amendment, United States Constitution,* and *of Article I, sections 9 and 20, Oregon Constitution.*

WHEREFORE, plaintiff prays for a decree reversing defendant's decision and declaring plaintiff is not liable to defendant in any amount.

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH

JOHN KERR, Plaintiff,	)	No. 342744
v.	)	DECREE AND
STATE PUBLIC WELFARE COMMISSION, Defendant.	)	JUDGMENT ORDER

This matter came on for trial April 10, 1969, in the above-entitled Court, plaintiff appearing by his attorney, Howard R. Lonergan, and defendant State Public Welfare Commission appearing by its attorney, Neil C. Hoyez. Arguments of counsel were heard and briefs were submitted.

The Court having heard the arguments of counsel, having reviewed the briefs, records, files and applicable laws herein and being fully advised in the premises, has concluded that the findings of fact and conclusions of law of the defendant Commission should be affirmed by the Court.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the findings of fact, conclusions of law and final decision of the defendant be and they hereby are adopted and the decision of the defendant be and it hereby is affirmed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment in the amount of $420.00 for

the defendant and against the plaintiff be entered by the clerk of the Court in accordance with ORS 416. 160(3).

Dated at Portland, Oregon, this 21st day of May, 1969.

s/James M. Burns
Judge

APPELLANT'S BRIEF p. 5

ISSUES ON APPEAL

* * *

2. Whether Oregon appropriations for the poor may be taxed on the basis of an accidental family relationship, even one unequal in that class, without violation of the due process and equal protection clauses of *section 1, Fourteenth Amendment, United States Constitution, and of Article I, sections 9 and 20, Oregon Constitution.*

* * *

APPELLANT'S BRIEF p. 10

* * *

2. The Oregon Relative Responsibility Law is a tax imposed wholly on accidental family relationship, not even equally within such class, is without a rational basis and denies the equal protection of the laws.

JUDGMENT OF AFFIRMANCE

BE IT REMEMBERED that in the COURT OF APPEALS of the State of Oregon, in the city of Salem, on this THURSDAY, the 4th day of JUNE, 1970, the following proceedings were had:

JOHN KERR,	)	
Appellant	)	Appeal from
v.	)	MULTNOMAH
STATE PUBLIC WELFARE	)	County
COMMISSION,	)	No. 342-744
Respondent	)	

This cause on April 28, 1970, having been duly submitted upon and concerning all questions arising upon

the record and then reserved for further consideration, and the court having fully considered all said questions as well as suggestions of counsel in their respective briefs finds there is not error as alleged.

IT THEREFORE IS CONSIDERED, ORDERED, ADJUDGED and DECREED that the decree and judgment order of the court below rendered and entered in this cause be and the same hereby is in all things affirmed.

Appellant having given an undertaking on appeal with Fidelity and Deposit Company of Maryland as surety conditioned that appellant will pay all damages, costs and disbursements which may be awarded against him on the appeal,

IT THEREFORE IS ORDERED that respondent have and recover of and from appellant and his surety its costs and disbursements in this court taxed at $30.

IT FURTHER IS ORDERED that this cause be remanded to the court below from which the appeal was taken with directions to enter a decree and judgment in accordance herewith.

PETITION FOR REHEARING p. 1

Appellant petitions for rehearing of the appeal and reversal of the judgment for the following errors:

* * *

2. The Court erred in determining that Oregon appropriations for the poor may be taxed on the basis of an accidental family relationship, even one unequal in that class, without violation of the due process and

equal protection clauses of *section 1, Fourteenth Amendment, United States Constitution,* and *Article I, sections 10 and 20, Oregon Constitution.*

ORDER DENYING REHEARING

BE IT REMEMBERED that in the Court of Appeals of the State of Oregon, in the City of Salem, on this Thursday the 4th day of June, 1970, the following proceedings were had:

JOHN KERR,	)	
Appellant,	)	Appeal from
v.	)	Multnomah
STATE PUBLIC WELFARE	)	County
COMMISSION	)	
Respondent.	)	

The court having duly considered appellant's petition for rehearing in the above entitled case, and the court being fully advised therein,

IT HEREBY IS ORDERED that said petition be and the same is hereby denied.

PETITION FOR REVIEW p. 1

Petitioner prays this Honorable Court to review the determination of the Court of Appeals of the State of Oregon.

* * *

POINTS ON REVIEW

* * *

2. Whether Oregon appropriations for the poor may be taxed on the basis of an accidental family relation-

ship, even one unequal in that class, without violation of the due process and equal protection clauses of *section 1, Fourteenth Amendment, United States Constitution* and of *Article I, sections 9 and 20, Oregon Constitution.*

ORDER DENYING REVIEW

BE IT REMEMBERED that at a regular term of the Supreme Court of the State of Oregon begun and held at the courtroom in the City of Salem on the first Monday, the 2nd day of March, 1970, Whereupon on this Tuesday the 29th day of September 1970, the same being the 87th judicial day of said term the following proceedings were had:

JOHN KERR,	)	
Appellant,	)	APPEAL FROM
v.	)	MULTNOMAH
STATE PUBLIC WELFARE COMMISSION,	)	COUNTY
Respondent.	)	

The court having duly considered appellant's Petition for Review, and the court being fully advised therein,

IT HEREBY IS ORDERED that said petition for review be and the same hereby is denied.

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Supreme Court, U.S.
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APR 12 1971
E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1175

JOHN KERR,

Petitioner,

v.

STATE PUBLIC WELFARE COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Oregon

BRIEF FOR RESPONDENT IN OPPOSITION

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In the SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1970

No. 1175

JOHN KERR,

Petitioner,

v.

STATE PUBLIC WELFARE COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Oregon

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

Petitioner's statement is accepted.

JURISDICTION

Petitioner's statement is accepted.

QUESTION PRESENTED

Petitioner's statement of the question presented is argumentative. Respondent offers the following instead:

> The Oregon Relatives' Responsibility Law makes a spouse, parent, or child liable, on a scale propor-

tionate to his gross income and to the number of persons dependent on that income, for monthly contributions to reimburse the State, in whole or in part, for public assistance funds extended to that person's spouse, children, or parents. Does such a law violate either the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment?

STATUTES INVOLVED

Petitioner's omission of the definitions of certain terms used in the Oregon Relatives' Responsibility Law may give a misleading impression as to the breadth of the law. Accordingly, the following section of the law is set forth below.

"ORS 416.010. For purposes of ORS 416.010 to 416.260:

* * *

"(3) A 'needy person' is one who is eligible for public assistance under the laws of the state.

"(4) 'Relative' or 'relatives' mean the living husband, wife, father, mother, son or daughter 21 years of age or over of an applicant for or a recipient of public assistance.

"(5) 'Total cost' means the total amount of public assistance of any type furnished by the Public Welfare Division or the county departments to a recipient for a given period."

Petitioner's omission of the Relatives' Contribution Scale included in ORS 416.060(1) may give a misleading impression as to the extent of a given relative's liability and as to the standard by which the extent of that liability is determined. Accordingly, the Relatives' Contribution Scale is set forth on the following page.

RELATIVES' CONTRIBUTION SCALE

Gross annual income of responsible relatives in one family in dollars		Number of persons dependent upon income									
		1	2	3	4	5	6	7	8	9	10
		MONTHLY PAYMENTS REQUIRED (in dollars)									
Over	But not Over										
0	5,000	0	0	0	0	0	0	0	0	0	0
5,000	5,500	10	0	0	0	0	0	0	0	0	0
5,500	6,000	20	0	0	0	0	0	0	0	0	0
6,000	6,500	30	0	0	0	0	0	0	0	0	0
6,500	7,000	40	10	0	0	0	0	0	0	0	0
7,000	7,500	50	20	0	0	0	0	0	0	0	0
7,500	8,000	60	30	10	0	0	0	0	0	0	0
8,000	8,500	70	40	20	0	0	0	0	0	0	0
8,500	9,000	80	50	30	10	0	0	0	0	0	0
9,000	9,500	90	60	40	20	0	0	0	0	0	0
9,500	10,000	100	70	50	30	10	0	0	0	0	0
10,000	10,500	Tot. Cost	80	60	40	20	0	0	0	0	0
10,500	11,000	Tot. Cost	90	70	50	30	10	0	0	0	0
11,000	11,500	Tot. Cost	100	80	60	40	20	10	0	0	0
11,500	12,000	Tot. Cost	Tot. Cost	90	70	50	30	20	10	0	0
12,000	12,500	Tot. Cost	Tot. Cost	100	80	60	40	30	20	10	0
12,500	13,000	Tot. Cost	Tot. Cost	Tot. Cost	90	70	50	40	30	20	10
13,000	13,500	Tot. Cost	Tot. Cost	Tot. Cost	100	80	60	50	40	30	20
13,500	14,000	Tot. Cost	Tot. Cost	Tot. Cost	Tot. Cost	90	70	60	50	40	30
14,000	14,500	Tot. Cost	Tot. Cost	Tot. Cost	Tot. Cost	100	80	70	60	50	40
14,500	15,000	Tot. Cost	Tot. Cost	Tot. Cost	Tot. Cost	Tot. Cost	90	80	70	60	50
15,000	15,500	Tot. Cost	Tot. Cost	Tot. Cost	Tot. Cost	Tot. Cost	100	90	80	70	60
15,500	16,000	Tot. Cost	Tot. Cost	Tot. Cost	Tot. Cost	Tot. Cost	Tot. Cost	100	90	80	70
16,000	16,500	Tot. Cost	Tot. Cost	Tot. Cost	Tot. Cost	Tot. Cost	Tot. Cost	Tot. Cost	100	90	80
16,500	17,000	Tot. Cost	Tot. Cost	Tot. Cost	Tot. Cost	Tot. Cost	Tot. Cost	Tot. Cost	Tot. Cost	100	90
17,000	17,500	Tot. Cost	Tot. Cost	Tot. Cost	Tot. Cost	Tot. Cost	Tot. Cost	Tot. Cost	Tot. Cost	Tot. Cost	100
17,500		Tot. Cost	Tot. Cost	Tot. Cost	Tot. Cost	Tot. Cost	Tot. Cost	Tot. Cost	Tot. Cost	Tot. Cost	Tot. Cost

STATEMENT OF THE CASE

Petitioner's statement of facts is literally correct, but may be misleading. Petitioner was not required in these proceedings to reimburse the Public Welfare Division for the total amount of public assistance extended to his father. He was held liable for the sum of $420, in partial reimbursement of the $2,561.52 extended to his father over a period of 18 months in 1964-1965 (R. 58).

Respondent acknowledges that the Federal question presented herein has been properly raised and preserved.

REASONS FOR DENYING THE WRIT

A. The Oregon Relatives' Responsibility Law Does Not Impose a Tax.

Contrary to petitioner's argument, the sums collected under the Oregon Relatives' Responsibility Law are not taxes. The Law makes a spouse, parent, or child liable for monthly contributions to reimburse the State, in whole or in part, for public assistance funds extended to that person's spouse, children, or parents. In this way, it simply requires those members of the recipient's immediate family who have a well-recognized common-law or statutory obligation to support him, and who have the financial ability to do so, to assume at least part of that obligation, rather than imposing the entire financial burden upon the State. Such a law is not a tax, but a legitimate regulation of family status, well within the police powers of the State.

B. The Constitution Does Not Prohibit the States from Looking to a Person's Immediate Family for His Support Before Supporting Him at Public Expense.

Petitioner's assertion that "support of the poor has been a public duty for centuries" is neither entirely true nor dispositive of this case. Historically, laws for the relief of the poor have often and properly looked first to a person's immediate family for his maintenance and support. For example, as early as 1601, the English poor law required the parents, grandparents, and children of "every poor, old, blind, lame and impotent person, or other poor person not able to work," to support such relatives at a rate to be assessed by the local justices of the peace, upon pain of forfeiting 20 shillings for every month they failed to do so. Poor Law of 1601, 43 Eliz. 1, c. 2, § 7.

Whatever the desirability, as a matter of social policy, of making the State absolutely liable for the support of needy persons, without regard to the financial condition of their immediate family, such a course is clearly not mandated by the Constitution. Laws providing for the relief of the poor do not automatically abolish one's common-law or statutory obligation to support the members of his immediate family.

C. The Oregon Relatives' Responsibility Law Is Not Discriminatory.

Petitioner asserts that the Oregon Relatives' Responsibility Law discriminates between persons similarly situated, because because other persons with

similar relationships are excluded from liability. That is simply not true. The law makes the spouse, the parents, and all children of a welfare recipient liable for contribution according to the same scale. What petitioner may be complaining about here is the fact that the State is not required, as a procedural matter, to locate all relatives who are liable under the law and join them in one action before it can require any one relative to pay the amount for which he is liable. However, this fact does not give rise to a Constitutional question. Each relative's liability under the law is fixed, and the person proceeded against has a right of contribution from those other relatives who are also able to pay. *Mallatt v. Luihn,* 206 Or. 678, 702-705, 294 P.2d 871, 882-883 (1956).

D. There Is No Conflict in State Court Determinations of the Federal Question Presented.

The Oregon Relatives' Responsibility Law is similar in all material respects to the laws found in most other states (and the District of Columbia) making the members of a person's immediate family liable for the support of persons confined in state mental institutions. Such laws have generally been upheld against attacks on Federal Constitutional grounds, including those made by petitioner here. See, *e.g., Beach v. Government of District of Columbia,* 116 U.S. App. D.C. 68, 70-71, 320 F.2d 790, 792-793, cert. den. 375 U.S. 943 (1963); *Department of Mental Health v. Coty,* 38 Ill. 2d 602, 604-606, 232 NE.2d 686, 687-688 (1967); *State v. Estate of Rase-*

man, 18 Mich. App. 91, 98-104, 170 N.W.2d 503, 506-509 (1969);[①] Annot., 20 A.L.R. 3d 363 (1968).

The only case cited by petitioner in which such a relatives' responsibility law was held unconstitutional is *Department of Mental Hygiene v. Kirchner*, 60 Cal. 2d 716, 36 Cal. Rptr. 488, 388 P.2d 720 (1964), vacated and remanded 380 U.S. 194 (1965), reaff'd 62 Cal. 2d 586, 43 Cal. Rptr. 320, 400 P.2d 321 (1965). However, *Kirchner* cannot help petitioner here, because it was not decided under the Federal Constitution. After this Court vacated the judgment in *Kirchner* and remanded the cause for clarification with regard to whether the decision was based on Federal law, state law, or both, the California Supreme Court carefully explained that its decision was based on its

> "* * * construction and application of California law, regardless of whether there is or is not compulsion to the same end by the federal Constitution." 62 Cal. 2d at 588, 43 Cal. Reptr. at 330, 400 P.2d at 362 (1965).

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① But *cf.* the later case of *Miller v. State*, 18 Mich. App. 145, 171 N.W.2d 3 (1969), which struck down an amended version of the Michigan statute on the dual ground that (1) basing the relative's monthly liability to pay on his net taxable income was arbitrary and unreasonable, because taxable income was not a valid indication of the relative's ability to pay, in view of possible loopholes in the Federal tax laws; and (2) adopting *taxable* income as the test of the relative's liability was an unconstitutional delegation of state legislative power to the United States Congress, since Congress controls the law which determines taxable income.

However, even assuming, arguendo, that that case was rightly decided, neither of the grounds relied on therein can serve as a basis for attacking the Oregon Relatives' Responsibility Law, because Oregon bases the relative's liability on his *gross* income, and on the number of persons dependent on that income as well.

It may be noted in passing that the United States Court of Appeals for the Ninth Circuit has characterized the *Kirchner* case in dictum as an example of a state court according more extensive rights than those granted by the Constitution and laws of the United States. See *Garcia v. United States,* 381 F.2d 778, 782 (9th Cir. 1967).

Finally, it may also be noted that comment in law reviews was almost uniformly critical of the *Kirchner* decision, despite the usual tendency of such journals to hail novel social-policy decisions as "progressive." Several commentators considered that the California court had abused its review powers by making the legislative determination that institutionalized persons should henceforth be supported exclusively by state revenues. See, *e.g., Notes,* 49 Cornell L.Q. 516, 520 (1964); 77 Harv. L. Rev. 1523, 1524 (1964); 16 Hastings L. J. 129, 133-134 (1964); 63 Mich. L. Rev. 562, 568 (1965); 12 U.C.L.A. L. Rev. 605, 613-614 (1965). Others criticized the decision on the more pragmatic ground that the loss of relatives' contributions in most states would necessitate a considerable increase in state revenues in order to maintain state institutions at even their current, frequently inadequate levels. See, *e.g., Notes,* 13 Kan. L. Rev. 298, 304 (1964); 39 N.Y.U. L. Rev. 858, 865 (1964). Practically all disagreed with the California court's conclusion that the *Kirchner* decision was required as a matter of equal protection.

CONCLUSION

Nothing in the Constitution prevents a State from looking to the members of a person's immediate family for his support before extending financial assistance to him as a needy person, at the expense of the general public. That is the only object and the only effect of the Oregon Relatives' Responsibility Law. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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THOMAS H. DENNEY
Assistant Attorney General
Counsel for Respondent

April 1971